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E. ROBERT SEAVER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL MEMORANDUM FOR APPELLEES IN LEMON v. KURTZMAN IN RESPONSE TO MEMORANDUM FOR APPELLEES IN ROBINSON v. DICENSO, NOS. 569, 570, OCTOBER TERM, 1970

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On August 5, 1970 and August 10, 1970, Appellees Kurtzman and Sloan (Commonwealth of Pennsylvania) and Appellee Schools in *Lemon* v. *Kurtzman*, respectively submitted their briefs in chief. On September 9, 1970, Appellees in the case of *Robinson et al.*, v. *DiCenso, et al.*, Nos. 569, 570, October Term, 1970, filed a "Memorandum for Appellees" which, at pp. 2-3, specifically deals with the instant case.

The Appellees Kurtzman and Sloan and Appellee Schools in *Lemon* v. *Kurtzman* now submit this Supple-

mental Memorandum pursuant to Rule 41 (5) of the Rules of the Supreme Court of the United States which permit a party to file a supplemental brief respecting "... other intervening matters that were not available in time to have been included in his brief in chief ..." and intend this Supplemental Memorandum to be responsive to the "Memorandum for Appellees" filed in *DiCenso*.

The *DiCenso* Memorandum suggests to the Court that *DiCenso* be heard (and thus considered) together with the *Lemon* case. The Memorandum thus implies that the *DiCenso* and *Lemon* cases are generally similar in nature, and even goes so far as to contend that *DiCenso* "presents a more appropriate case for determination of the issues than the *Lemon* case" because of the trial and factual determinations relating to the operation of Rhode Island Schools and the Rhode Island statute.

The *DiCenso* Memorandum is inaccurate in characterizing these cases as similar and is unsound in its reasoning that *DiCenso* is a better vehicle for constitutional adjudication of a nationwide issue than *Lemon*.

1. For the reasons set forth in the Brief for Appellee Schools (pp. 16-24) in *Lemon* v. *Kurtzman*, the posture of this case makes it ripe for adjudication by this Court. The *Lemon* case presents *a clear-cut issue of law* regarding the constitutionality of the Pennsylvania statute *on its face*. The holding in *Lemon* would apply to all similar statutes regardless of variations in statutory application, in school practices or in disputed fact finding from state to state.

On the contrary, the *DiCenso* decision was limited to a resolution of the Rhode Island statute *as applied* to a limited number of schools in that state. The trial and factual determinations of the operation of the

Rhode Island statute in *DiCenso* render that case peculiarly inappropriate for adjudication of the nationwide issue, because it deals exclusively with the Rhode Island situation.

The *DiCenso* case relates only to Catholic schools as they are operated in the State of Rhode Ihland. This is to be contrasted with the broad and diverse mix of schools involved in *Lemon,* as is evidenced by the parties and pleadings in this case. These schools include private schools, schools of differing sects, as well as nondenominational schools.

It is clear, therefore, that this Court cannot determine a purely square issue of law of facial constitutionality of a statute, as presented to the Court in *Lemon,* by a consideration of facts peculiar to the operation of another statute, as presented to this Court in *DiCenso.*

2. A brief comparison of the statutes involved in the two cases will demonstrate that the two cases are not similar:

(a) The stringent constitutional safeguards imposed by the statute in *Lemon,* as compared with the statute in *DiCenso,* reveal crucial differences in the two cases. Section 5603 (3) of the Pennsylvania statute expressly excludes from reimbursement by the state "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

No such clear-cut limitation to the secular function is provided by the statute in *DiCenso.* The Rhode Island statute neither defines nor limits the categories of aid beyond "those subjects required to be taught by state law, to the same extent as those subjects are taught in public schools, or which are provided in public schools." (Section 16-49-2(2)). This broad prescription, involving a broad class of many subjects with

potentially complex and varying administration problems, may be compared with the categorical limitations in the narrow provisions of the Pennsylvania statute (Section 5604) which is limited to four defined categories of markedly non-value-related subjects, all of which are prime public-interest areas whose priority is recognized in the National Defense Education Act: Mathematics, Modern Foreign Languages, Physical Science, and Physical Education.

(b) The Rhode Island statute places private school teachers directly on the public payroll without corresponding provisions normally governing public employees. The Pennsylvania statute contains no such undertaking by the state and does not pay teacher salaries. It provides for reimbursement to a school of a state-audited instructional cost, of which only that portion of teacher services allocable to one or more of the four subjects is a part.

(c) The Rhode Island statute may be interpreted to imply (Section 16-49-1) a duty on the part of the state, for parity of support as between nonpublic and public education (reciting that the state has a duty to provide "a quality education for all . . . youth, those in public and nonpublic schools alike"). By contrast the Pennsysvania statute does not express or imply such duty, but is based on the *Everson-Allen* principle that it is *permissible* (but not mandatory) for a state to afford aid to secular functions of church-related schools.

Appellees Kurtzman and Sloan and Appellee Schools in the instant case take no position as to whether the Court should note probable jurisdiction in the *DiCenso* case, or whether the Rhode Island statute is constitutional or unconstitutional. Appellees Kurtzman and Sloan and Appellee Schools do contend, however, that the *DiCenso* and *Lemon* cases are separate and distinct

cases raising separate and distinct issues, and that the statute in the *Lemon* case should be considered by this Court solely on its own merits, apart from the *DiCenso* case.

Appellees Kurtzman and Sloan and Appellee Schools further contend that the adjudication of the *Lemon* case should not in any way be beclouded by any joinder or proximity of the oral argument in *Lemon* with the oral argument, if any, in *DiCenso*.

Respectfully submitted,

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